

¹ Although the parties agreed that claimant sustained an accident on May 31, 2000, the date of accident remained an issue as claimant has alleged repetitive micro-traumas after that specific date since filing his initial application. Also see *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000) in which the Kansas Court of Appeals held that the trier of fact is not bound by the parties' stipulation as to the date of accident.

ISSUES

Claimant initiated this claim alleging that he sustained a May 31, 2000 accident followed by a series of repetitive micro-traumas that resulted in injuries to both knees. But in the November 5, 2002 Award, Assistant Director Hursh determined that claimant's accident occurred on May 31, 2000, and that claimant failed to provide respondent with timely notice of the accident. Consequently, the Assistant Director denied claimant's request for benefits.

As indicated above, at oral argument before the Board the parties stipulated that claimant provided notice to respondent at least by June 13, 2000, when respondent prepared its accident report regarding the May 31, 2000 incident. Accordingly, at oral argument respondent withdrew timely notice of the accident as an issue to be decided on this appeal.²

Claimant requests the Board to reverse the November 5, 2002 Award and grant him permanent partial general disability benefits for a 26 percent whole body functional impairment, plus future medical benefits for both knees. Claimant argues that in addition to the May 31, 2000 incident, the medical evidence is uncontradicted that he also sustained repetitive injuries to both knees following that date due to his work activities finishing sheetrock. Accordingly, claimant contends that the appropriate date of accident in this claim for repetitive mini-traumas to the knees is either the last date that he worked before the October 23, 2000 right knee surgery or the date of the regular hearing.

Conversely, respondent and its insurance carrier argue that claimant's contention that his work duties caused additional micro-traumas to his knees through his last day of work for respondent or through the date of regular hearing is without merit. They argue claimant's award should be limited to only that additional functional impairment that can be specifically attributed to the May 31, 2000 incident, which they contend is limited to between two and five percent to the right lower extremity.

As indicated above, the notice issue is withdrawn. Consequently, the issues now before the Board on this appeal are:

1. What is the appropriate date of accident for claimant's injuries?
2. What is the nature and extent of claimant's present injury and disability?

² See *McIntyre v. A. L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996) in which the Court held that weekends are excluded when counting the days required for providing an employer with notice of an accidental injury.

3. What is the amount of preexisting functional impairment that should be deducted in determining claimant's award?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the entire record and the parties' arguments, the Board finds and concludes, as follows:

1. What is the appropriate date of accident for claimant's injuries?

According to the administrative file, claimant initially filed an application for hearing alleging a date of accident of May 31, 2000, and aggravations up to August 7, 2000. But later, on February 21, 2002, claimant filed an amended application for hearing alleging a date of accident on "May 31, 2000 and aggravations up to and including the present." At a July 9, 2002 hearing before Administrative Law Judge Robert H. Foerschler, the Judge noted the claimed accident date included allegations that claimant's injury continued through the present. And in claimant's September 3, 2002 submission letter to the Judge, claimant noted that the date of accident was the first issue to be determined by the Judge, as he wrote:

Whether claimant sustained injuries to both his legs as a result of the initial fall or from repeated micro traumas to both legs from May 31, 2000 to the present time.

Accordingly, the appropriate date of accident was an issue to be decided in determining this claim.

Based upon the overwhelming medical evidence, the Board concludes that claimant sustained a series of repetitive micro-traumas to both knees each and every day while working for respondent as a drywall finisher.

Following a right knee injury in 1988 that resulted in arthroscopic surgery and a partial meniscectomy (and, perhaps, a torn anterior cruciate ligament), claimant returned to work for respondent as a drywall finisher. According to the medical evidence presented, drywall finishing is very stressful to the knees and even more so when performed on stilts, which claimant often did. Not surprisingly, as claimant performed his everyday job duties he sustained repetitive traumas to his knees that resulted in arthritic changes in both knees. X-rays taken in July 2000 confirmed those changes. By the time claimant underwent a total right knee replacement in October 2000, claimant had worn down $\frac{3}{8}$ inch of bone from the medial tibial plateau in the right leg.

The medical evidence presented is quite substantial that the incident that claimant experienced on May 31, 2000, when he slipped while on stilts was a relatively minor incident compared to the repetitive mini-traumas that claimant sustained each and every day at work. According to Dr. Roger Hood, the board-certified orthopedic surgeon who performed claimant's total right knee replacement, claimant actually should have undergone that surgery two or three years earlier before he had ground the bone into dust.

Claimant first saw Dr. Hood in August 2000. The doctor found claimant's right knee had deteriorated to an extent that is usually found in an 80-year-old. According to the doctor, claimant's right knee joint was probably bone on bone three or four years before the May 2000 incident, which "contributed very little in terms of the total picture, but it caused the total picture to come crashing down."³

Upon questioning, Dr. Hood agreed with claimant's attorney that claimant's right knee condition resulted "from years of micro[-]traumas of walking on stilts and doing heavy work."⁴ The doctor also agreed that claimant was continuing to sustain micro-traumas to both knees due to his continuing to work as a drywall finisher.

Q. (Mr. Horner) If this gentleman is back doing Sheetrock finishing work, not on stilts, but finishing work which requires some climbing on scaffold, climbing stairs, carrying buckets of mud, being on his feet all day, can that type of work aggravate a knee condition?

A. (Dr. Hood) Sure. That's not the best occupation to return to with a total knee, but that's what he does.

Q. Essentially what we have is a gentleman who is receiving micro[-]traumas to a knee that got replaced; isn't that true?

A. That's fair to say, yes.

Q. Would that also be the same for the left knee that he had some arthritis, by your admission, that that kind of work would tend to create micro[-]traumas to that knee as well, wouldn't it?

A. Yes.

Q. A number of micro[-]traumas have a cumulative effect of worsening a condition in both of those knees, don't they?

³ Hood Depo. at 30.

⁴ *Id.* at 36-37.

A. Yes.⁵

Dr. Hood's opinions regarding the significant stress placed on the knees by claimant's work as a drywall finisher are echoed by Dr. Truett Swaim, who examined claimant in July 2001 at claimant's attorney's request. Dr. Swaim, who is also a board-certified orthopedic surgeon, testified how the May 2000 incident probably aggravated the arthritis in claimant's knees and how the incident resulted in the total right knee replacement. Moreover, Dr. Swaim testified how claimant's work activities for respondent would either cause or aggravate the arthritis in claimant's knees.

In my report of July 26, 2001, assess that occupational injury of May 31st, 2000, appears to have aggravated preexisting arthritic condition of both knees and did accelerate the right knee for right total knee replacement and occupational injury of May 31st, 2000, also substantially contributed to cause the recurrent tear of the medial meniscus of the right knee. **With the caveat that considering that this gentleman worked as a sheetrocker, his cumulative trauma and stress of a sheetrocker in and of itself would substantially contribute to cause the development of arthritis of the -- of -- in a knee, either by causing it or aggravating it.**⁶ (Emphasis added.)

Dr. Swaim also testified how claimant's work before and after the May 2000 incident was such to aggravate, intensify, or accelerate the conditions in his knees.

Q. (Mr. Horner) Will the kind of work that Mr. Hahn is doing as a sheetrock finisher on a full-time basis aggravate, accelerate and intensify those [knee] conditions to require surgical intervention more rapidly than if he were a librarian?

A. (Dr. Swaim) Yes. I think the -- **the exposure to impact loading and stress across the joint in his occupation as a sheetrock finisher would be a greater substantially contributing factor to cause arthritis or acceleration of arthritis** as compared to someone who has a relatively sedentary job. (Emphasis added.)

Q. Doctor, if you were to see someone such as a lawyer or a librarian or an accountant that's 53 years old, would you expect to see these kinds of changes, radiographic changes in their knees that you've seen in Mr. Hahn?

A. No. I mean, it would -- he's -- he's relatively young for that. There's -- I mean, it's not completely rare. There are other people that have total knee [re]placements at age 50 years old, but it's unusual. **Generally, in somebody that has had some**

⁵ *Id.* at 42-43.

⁶ Swaim Depo. at 17-18.

sort of -- that has a -- that their knees necessitate total knee arthroplasty or consideration of total knee arthroplasty by age 51 or 2 have either got -- had, you know, some trauma to their joint or a[n] arthritic condition, such as rheumatoid arthritis or lupus or something that tears up the joint itself, or have had angular deformity or malalignment of the joint that contributed or caused it. **Or had a -- or had some outside external stress such as, you know, a stressful job** or has had -- has been a, you know, a basketball, baseball player kind of person that injured his knee several times.⁷ (Emphasis added.)

According to the history taken by Dr. Swaim, claimant has been continuously employed by respondent since 1996. And before that claimant worked for respondent from 1988 through 1994. On August 1, 2002, when claimant last testified, he continued to work for respondent as a drywall finisher.

See *Treaster*⁸ in which the Kansas Supreme Court held that an appropriate date of accident in a micro-trauma case could be either the last day of work or the date that the worker's job duties were substantially altered so as to eliminate those tasks that were causing the micro-traumas.

Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.⁹

In this claim claimant continued to work for respondent through the date that he last testified and, thus, continued to perform his duties as a drywall finisher and continued to sustain repetitive micro-traumas to both knees.

Also see *Pyeatt*,¹⁰ which held that an employer was not prejudiced when the evidence offered in the proceeding varied from the allegations set forth in the initial claim.

Under the facts of this case, although the workers' compensation claim initially filed varied from the proof offered at the disability hearing, **the employer was not prejudiced**. Though the claimant failed to amend his original claim to include a second accident, the respondent had sufficient notice of both accidents and

⁷ *Id.* at 20-21.

⁸ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

⁹ *Id.* at Syl. ¶ 4.

¹⁰ *Pyeatt v. Roadway Express, Inc.*, 243 Kan. 200, Syl. ¶ 4, 756 P.2d 438 (1988).

sufficient knowledge that the claim for compensation was based on both accidents.
(Emphasis added.)

Considering the entire record, the Board concludes it is more probably true than not that claimant sustained repetitive micro-traumas to his knees while working for respondent as a drywall finisher each and every workday from 1996 through the present. As suggested by claimant's attorney at oral argument before the Board, the appropriate date of accident for this repetitive series of micro-traumas is the last date worked before claimant's August 1, 2002 regular hearing testimony. As the record does not disclose that date, the Board will use July 31, 2002, as the date of accident for purposes of computing claimant's workers compensation benefits.

The Board notes that claimant initially did not allege that his series of micro-traumas began in 1996. But the date of accident ultimately found should depend upon the evidence adduced. Accordingly, the Board will conform the pleadings to the evidence.¹¹ As indicated above, the Board is not bound by the parties' stipulations. Moreover, the Board is not bound by technical rules of procedure as long as the parties are given a reasonable opportunity to be heard and present evidence.¹²

The respondent and its insurance carrier are not prejudiced as they were on notice from the beginning of this claim that claimant alleged a series of micro-traumas from the work that he was performing for respondent. By finding a series of micro-traumas commencing in 1996, the claim for benefits has not been significantly changed as it conforms with claimant's theory that he was injured as the result of repetitive micro-traumas following the May 31, 2000 incident. As the date of accident was an issue from the beginning, the parties elicited testimony from claimant and the medical experts on that issue and the extent of claimant's preexisting functional impairment before claimant's series of micro-traumas began.

¹¹ See *Tedder v. Phil Blocker, Inc.*, Nos. 264,296 and 264,297, 2002 WL 598489 (Kan. WCAB Mar. 29, 2002); *Chilgren v. Topeka State Hospital (State of Kansas)*, No. 202,008, 1995 WL 715328 (Kan. WCAB Nov. 17, 1995); *Cozad v. Boeing Military Airplane Co.*, No. 169,966, 1998 WL 229853 (Kan. WCAB Apr. 24, 1998), *aff'd*, 27 Kan. App. 2d 206, 2 P.3d 175 (2000); *Wagner v. Interstate Brands Corporation*, Nos. 222,155 and 222,156, 1998 WL 304289 (Kan. WCAB May 15, 1998); and *Davenport v. Hallmark Cards, Inc.*, No. 165,642, 1998 WL 462612 (Kan. WCAB July 27, 1998), all of which involved repetitive micro-trauma injuries and in which the accident date was changed to conform to the evidence adduced.

¹² *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

2. What is the nature and extent of claimant's present injury and disability?

Because of the repetitive micro-traumas that claimant sustained, he developed arthritis in both knees. Moreover, in the right knee claimant wore away approximately $\frac{3}{8}$ inch of bone before undergoing a total knee replacement in October 2000.

Both Drs. Hood and Swaim provided their opinion of claimant's present functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides). Dr. Hood testified that claimant now has a 40 percent functional impairment to the right lower extremity. And Dr. Swaim testified that claimant now has a 50 percent functional impairment to the right lower extremity. Giving equal weight to both opinions, the Board finds that claimant's present functional impairment to the right lower extremity is 45 percent due to the series of repetitive micro-traumas that claimant sustained through July 31, 2002.

Although Dr. Hood neither treated nor examined the left lower extremity, he did review the information provided by x-rays that were taken in July 2000. Based upon the joint narrowing revealed in those studies, Dr. Hood indicated that claimant had a 10 to 15 percent functional impairment in the left lower extremity. On the other hand, Dr. Swaim evaluated claimant's left knee and determined that claimant had a 20 to 25 percent functional impairment to the left lower extremity. Again, the Board is not persuaded that either doctor's opinion is more persuasive than the other. Consequently, the Board gives equal weight to the doctors' ratings and finds that claimant has sustained a 17.5 percent functional impairment to the left lower extremity due to the series of repetitive micro-traumas that he sustained while working for respondent.

Using the conversion percentages and the combined values chart in the AMA Guides, the Board finds that claimant presently has a 24 percent whole body functional impairment due to the permanent impairment in claimant's knees.¹³

3. What is the amount of preexisting functional impairment that should be deducted in determining claimant's award?

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

¹³ See *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997) in which the Kansas Supreme Court held that an injured worker was entitled to receive permanent partial general disability benefits, rather than benefits for two separate scheduled injuries, for simultaneous injuries to opposite extremities although the symptoms in the extremities manifested themselves at different times.

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.¹⁴

And respondent and its insurance carrier bear the burden of proving the amount of claimant's preexisting functional impairment.¹⁵

Although the theory of reducing benefits for preexisting functional impairment is simple, applying that theory to repetitive micro-trauma injuries is not a simple task. As *Depew*¹⁶ and other appellate court decisions indicate, the symptoms from micro-trauma injuries may manifest themselves at entirely different times even though the micro-trauma injuries are occurring simultaneously. The difficult issue in micro-trauma injuries is determining what point in time to assess any preexisting functional impairment for purposes of reducing the award. In reality, as the medical evidence is overwhelming that this is a micro-trauma injury, that is the principal issue in this claim.

Under these facts, the Board finds that claimant's preexisting functional impairment should be measured at that point in time he began working for respondent in 1996.

The record is uncontradicted that claimant injured his right knee in 1988 and underwent an arthroscopy. But the record is not entirely clear as to the nature and extent of that injury. Dr. Swaim testified that claimant had a partial meniscectomy due to the 1988 injury and, therefore, he would have rated claimant's functional impairment at two percent to the right lower extremity. Dr. Hood, however, testified that claimant lost his anterior cruciate ligament as a result of the accident and, therefore, claimant would have had a 40 percent functional impairment to the right lower extremity following the 1988 accident.

Giving equal weight to Drs. Swaim and Hood's ratings, the Board finds that claimant sustained a 21 percent functional impairment to the right lower extremity as a result of the 1988 injury, which comprises an approximate eight percent whole body functional impairment.

Consequently, before claimant commenced working for respondent following the 1988 accident and before he began experiencing the repetitive series of micro-traumas to

¹⁴ K.S.A. 44-501(c).

¹⁵ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. ____ (2001).

¹⁶ *Depew*, 263 Kan. at 15.

his knees that is the subject of this claim, he had an approximate eight percent whole body functional impairment. Accordingly, the Board finds and concludes that the preexisting eight percent whole body functional impairment should be deducted from claimant's present 24 percent whole body functional impairment rating, limiting claimant's permanent partial general disability award to 16 percent.

AWARD

WHEREFORE, the Board modifies the November 5, 2002 Award and grants claimant an award for 10 weeks of temporary total disability benefits; a 16 percent permanent partial general disability; and authorized, unauthorized and future medical benefits for both knees.

Walter Samuel Hahn is granted compensation from Midwest Drywall Co., Inc., and its insurance carrier for a July 31, 2002 accident and resulting disability. Mr. Hahn is entitled to receive 10 weeks of temporary total disability benefits at \$432 per week, or \$4,320, plus 66.40 weeks of permanent partial general disability benefits at \$432 per week, or \$28,684.80, for a 16 percent permanent partial general disability and a total award of \$33,004.80.

As of June 30, 2003, Mr. Hahn is entitled to receive 10 weeks of temporary total disability compensation at \$432 per week in the sum of \$4,320, plus 37.71 weeks of permanent partial general disability compensation at \$432 per week in the sum of \$16,290.72, for a total due and owing of \$20,610.72, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$12,394.08 shall be paid at \$432 per week until paid or until further order of the Director.

Claimant is entitled to payment of the authorized medical benefits.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum.

Future medical benefits may be considered upon proper application to the Director.

The Board approves claimant's contract for attorney fees to the extent that it complies with K.S.A. 44-536.

The Board adopts the order and itemization regarding payment of the deposition expenses as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of June 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority regarding the appropriate date of accident in this matter and regarding the nature and extent of claimant's preexisting functional impairment.

Claimant initially alleged a specific traumatic incident to his right knee beginning on May 31, 2000 and ending August 7, 2000. That date of accident was later amended to include a series of accidents beginning May 31, 2000, and continuing thereafter. At the time of oral argument to the Board, claimant's attorney argued that the date of accident was, in reality, a series of accidents beginning when claimant first began working for respondent.

Claimant suffered a serious injury to his right knee in 1988 for which claimant received treatment, an impairment rating and after which claimant suffered periodic difficulties. Additionally, claimant began suffering problems with his left knee over time. By the time claimant was examined by Dr. Roger Hood in August 2000, claimant's right knee had been a candidate for total replacement for several years. Dr. Hood rated claimant's right lower extremity at 40 percent after the completion of the knee replacement. However, Dr. Hood testified that claimant's right knee prior to the total knee replacement would have been at 65 to 70 percent of the right lower extremity due to the significant loss of bone in the joint. Dr. Hood testified that the vast majority of claimant's problem preexisted the May 31, 2000 alleged date of accident. Additionally, Dr. Hood testified that claimant's 10 to 15 percent impairment of the left knee would have preexisted May 31, 2000.

. . . due process is a United States and Kansas constitutional protection, and the procedures of the Workers Compensation Act must include procedures adequate to provide due process.¹⁷

K.S.A. 44-520 requires that notice of accident be provided within 10 days of the date of accident “stating the time and place and particulars thereof. . . .”

To satisfy due process, notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.¹⁸

Notice should be more than a mere gesture; it should be reasonably calculated, depending upon the practicalities and peculiarities of the case, to apprise interested parties of the pending action and afford them an opportunity to present their case.¹⁹

. . . where the legislature has provided the right of an appeal, the minimum essential elements of due process of law in an appeal affecting a person’s life, liberty, or property are notice and an opportunity to be heard at a meaningful time and in a meaningful manner.²⁰

Here, claimant provided timely notice of accident alleging a date of accident of May 31, 2000 and thereafter. Respondent’s defenses and its position regarding what, if any, preexisting impairment claimant may have suffered for which respondent would be eligible for a credit under K.S.A. 44-501(c) are all based upon the alleged dates of accident. Respondent’s examination of the health care providers solicited specific testimony regarding claimant’s preexisting impairment using May 31, 2000 as the targeted date. Dr. Truett Swaim’s testimony discusses claimant’s right and left knee conditions prior to May 31, 2000. The Board, in creating a series of accidents beginning prior to May 31, 2000, has not only helped to litigate claimant’s case but has seriously compromised respondent’s defense of this case.

When an administrative law judge conducts a regular hearing, the parties are given specific time limits within which to submit their evidence. At the conclusion of those submittal dates, the record is considered closed and additional evidence is generally not

¹⁷ *Nguyen v. IBP, Inc.*, 266 Kan. 580, 589, 972 P.2d 747 (1999).

¹⁸ *Id.* at 588; *State v. Lewis*, 263 Kan. 843, Syl. ¶ 9, 953 P.2d 1016 (1998).

¹⁹ *Nguyen*, 266 Kan. at 589, citing *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314-315, 94 L. Ed. 865, 70 S. Ct. 652 (1950).

²⁰ *Nguyen*, 266 Kan. at 588.

allowed unless the administrative law judge grants an extension of the time limits originally set.²¹ No such extensions were requested in this matter.

Additionally, the first time the modified date of accident for a date preceding May 31, 2000, was discussed was at oral argument before the Board. Review by the Board is limited to questions of law and fact presented to and introduced before the administrative law judge.²² New evidence is generally not allowed at the time of appeal to the Board unless the evidence is stipulated to by all the parties to the action. There was no such stipulation regarding the modification of claimant's date of accident. To allow such a modification at this late hour deprives respondent of its due process right to present a meaningful defense.

Claimant has alleged a date of accident of May 31, 2000, and a series thereafter. Any allegations of an injury prior to that date and any evidence presented as to that modified date of accident would deny respondent its right to due process as notice of claimant's allegations would not have been provided in time to afford respondent an opportunity to present any objections or any evidence as to the preexisting functional impairment.

In this instance, there is clear prejudice to the respondent as its evidence of preexisting impairment to claimant's right and left lower extremities was adversely affected by the allowed modification of the date of accident. This Board Member would find that claimant is bound by the allegations of a date of accident of May 31, 2000, and a series thereafter and respondent is entitled to a reduction under K.S.A. 44-501(c) for the amounts of functional impairment determined to preexist May 31, 2000.

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Michael J. Haight, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Assistant Director
Paula S. Greathouse, Workers Compensation Director

²¹ K.S.A. 2002 Supp. 44-523.

²² K.S.A. 44-555c(a).